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No. 03-128

IN THE

Supreme Court of the United States

UNITED TECHNOLOGIES CORP., PRATT & WHITNEY,
Petitioner,

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with supporters in all 50 states. WLF engages in litigation and participates in federal and state judicial proceedings in a variety of areas of importance to free enterprise, including the proper application of evidentiary rules regarding expert testimony in civil matters. To that end, WLF appeared as an amicus in this Court's three recent cases addressing the use of expert testimony, *Kumho Tire Co., v. Carmichael*, 526 U.S. 137 (1999); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

WLF is concerned that, unless reversed by this Court, the erroneous decision of the Federal Circuit in the present case (excluding expert testimony admitted by the trier of the facts in a specialized area) will have an adverse effect on future proceedings before the Court of Federal Claims and the many administrative boards within the Federal Circuit's jurisdiction. The court's decision will result in: (1) inefficient use of judicial and administrative resources in resolving government contract disputes involving scientific, technical or other specialized knowledge; (2) dramatically increased likelihood of error; and (3) great uncertainty in government contracting at a time of critical need for sophisticated government procurement.

Counsel for the parties have consented to the filing of this brief in letters lodged with the Clerk of the Court.[1]

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel,

SUMMARY OF ARGUMENT

Confidence in the fair and predictable resolution of disputes is an essential part of the Federal procurement system. That confidence is eroded by decisions that depart from traditional rules of law. Erroneous decisions of the Federal Circuit in government contract cases have exceptional importance because of their financial and policy impact on the government and its contractors. In the absence of review by this Court, those decisions become governing law nationwide because they are not subject to challenge in any other court.

The Federal Circuit's decision excluding expert testimony on terms having a special meaning in government procurement will adversely affect proceedings in the Court of Federal Claims and the administrative boards trying government contract disputes. Many of the terms in the Cost Accounting Standards ("CAS") and other provisions in government contracts have special meanings that are different from their plain and ordinary meanings.

The CAS are special accounting rules written by accountants that often require explanation and interpretation by accountants. Expert testimony is essential to both parties in most cases involving CAS. Such testimony contributes to fair, knowledgeable and expeditious resolution of disputes.

In the instant case, the Armed Services Board of Contract Appeals ("ASBCA" or "the Board"), the trier of the facts, admitted expert testimony to assist it in determining whether revenue share payments made by petitioner to its foreign collaborators constituted a "cost" for parts provided by the collaborators that must be included in petitioner's indirect

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contributed monetarily to the preparation or submission of this brief.

cost input allocation base pursuant to CAS 410, 418, and 420. It correctly admitted and relied on expert testimony that the CAS terms "input cost of material" have special trade practice meanings.

In the instant case, the Federal Circuit failed to apply the abuse of discretion standard of review and erred in holding that the expert testimony was inadmissible. The applicable rules of evidence and this Court's decisions make the trier of the facts the gatekeeper on the admissibility of expert testimony.

The law is well established that specialized terms are like terms of art that permit expert testimony to assist the trier of the facts in understanding the evidence and deciding the case. The decisions of this Court are directly contrary to the Federal Circuit's exclusion of expert testimony in the instant case.

ARGUMENT

I. ERRONEOUS GOVERNMENT CONTRACT DECISIONS OF THE FEDERAL CIRCUIT HAVE NATIONWIDE IMPACT BECAUSE OF ITS EXCLUSIVE JURISDICTION.

The government purchases hundreds of billions of dollars of products and services annually. The statutory procedure for resolving government contract disputes is an important part of the government procurement system. Confidence in the fair and predictable resolution of disputes is essential to the procurement system.

The Federal Circuit's unique exclusive jurisdiction in government contract matters causes many of its decisions to have exceptional importance and extraordinary financial and policy impact on the government and its contractors. Many of the cases involve hundreds of millions of dollars. In the

absence of review by this Court, erroneous Federal Circuit decisions on important government contract matters become the governing law nationwide because they are not subject to challenge in any other federal court. The decision in the instant case and other recent erroneous decisions have departed from traditional rules of law and are eroding confidence in the fairness of the disputes resolution process.

II. THE DECISION OF THE FEDERAL CIRCUIT IN THE INSTANT CASE WILL ADVERSELY AFFECT PROCEEDINGS BEFORE THE COURT OF FEDERAL CLAIMS AND THE ADMINISTRATIVE BOARDS UNLESS REVERSED BY THIS COURT.

Federal Circuit decisions on government contract disputes are binding precedent on the Court of Federal Claims and the many administrative boards deciding government contract disputes. Experts assist the trier of the facts by providing special understanding and knowledge of industry practices on a broad range of Government rules and regulations, including the Cost Accounting Standards ("CAS"), Federal Acquisition Regulations ("FAR"), and Generally Accepted Accounting Principles ("GAAP"). Experts provide relevant and reliable testimony on terms that have a special meaning based on trade and usage that are different from their seemingly plain and ordinary meaning. Experts are essential to both parties in most CAS cases because of the special meaning of CAS terms and their relationship to other CAS, FAR, and GAAP terms and concepts, and the complexity of their application to particular facts. Experts narrow and focus the issues and permit the trial judge to gain assistance through expert reports, direct and cross examination and judicial questioning. This all contributes to fair, knowledgeable and expeditious resolution of disputes.

The Federal Circuit's decision will result in inefficient use of judicial and administrative resources in resolving government contract disputes involving scientific, technical or other specialized knowledge. CAS, FAR and GAAP are examples of the need for specialized knowledge. Without the benefit of expert testimony on these subjects the likelihood of error will be dramatically increased. Erroneous decisions discourage contractors vital to government procurement from doing business with the government.

A. The Cost Accounting Standards Are Specialized Accounting Rules Written By Accountants And Often Require Interpretation By Accountants.

Congress created the CAS Board to establish cost accounting standards. The CAS statute provides that the CAS Board is to "promulgate ... cost-accounting standards [] designed to achieve more uniformity and consistency in the cost-accounting" practices followed by defense contractors and subcontractors under Federal contracts. 41 U.S.C. § 422(f)(1), Pet. App. 111a-112a. The CAS Board has promulgated specialized accounting rules that must be followed by the government and government contractors covered by CAS.

Accountants in private industry must interpret and advise government contractors on how to comply with these accounting rules. Government accountants must interpret and advise the government on whether contractors are complying with these accounting rules. When a dispute arises over the meaning of CAS, the accountants of both parties frequently are essential witnesses to understanding and deciding the dispute.

B. The Board Properly Admitted Expert Testimony To Assist It In Understanding The Evidence And Deciding The Case.

The Board, the trier of facts, admitted the expert testimony to assist it in determining whether revenue share payments made by petitioner to its foreign collaborators constituted a "cost" for parts provided by the collaborators that must be included in petitioner's indirect cost input allocation base pursuant to CAS 410, 418, and 420. *Appeals of -- United Techs. Corp., Pratt & Whitney*, Pet. App. 32a. There is no plain or universal meaning of "cost" for government contracting. Instead, the meaning of that term varies depending on the function it is to serve and its context.

The experts for both parties were well qualified to assist the trial judge in understanding whether the revenues shared under these novel contractual arrangements were costs for CAS purposes and their appropriate treatment under CAS. The experts had specialized understanding of the subject involved in the dispute.

The experts provided testimony regarding: (1) the regulatory history of CAS; (2) the meaning of "cost" as used in CAS and GAAP; (3) the application of that meaning in accordance with the economic substance of the particular transaction; (4) the nature and economic substance of the collaboration agreements; (5) the resulting meaning of "cost" in the context of the collaboration agreements and the revenue share payments; and (6) the proper classification of revenue distributions using accepted accounting principles and practices for cost accounting and pricing purposes.

The Board closely examined and accorded weight to the experts' testimony as it deemed appropriate and concluded that:

> [T]he collaborators are not subcontractors to Pratt and that the program revenue share payments distributed by Pratt to them should not be treated as payment for the cost of the parts they manufacture. Accordingly, Pratt is not required to include revenue share payments distributed to its collaborators in its MOH allocation base under CAS 418.50(d)(2) or its G&A and IR&D/B&P total cost input bases under CAS 410.50(d)(1) and CAS 420.50(f)(2). Pratt's accounting for collaboration parts complies with these CAS requirements.

Id. Pet. App. 105a.

III. THE FEDERAL CIRCUIT FAILED TO APPLY THE ABUSE OF DISCRETION STANDARD OF REVIEW TO THE BOARD'S DECISION ON THE ADMISSIBILITY OF EXPERT TESTIMONY.

The Federal Circuit erred in summarily disregarding the Board's decision to admit expert testimony and its findings based thereon by holding:

> The views of the self-proclaimed CAS experts, including professors of economics and accounting, a former employee of the CAS Board, and a government contracts accounting consultant, as to the proper interpretation of those regulations is simply irrelevant to our interpretive task; such evidence should not be received, much less considered, by the Board on the interpretive issue.

Rumsfeld v. United Techs. Corp., Pet. App. 13a.[2]

The Federal Circuit failed to recognize that the decision of the trier of the facts to admit expert testimony is controlling on the admissibility issue unless that decision was an abuse of discretion. As this Court has repeatedly held, "abuse of discretion is the proper standard of review of a district court's evidentiary rulings." *See General Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997) (citing *Old Chief v. United States*, 519 U.S. 172, 174 n.1 (1997)) and *United States v. Abel*, 469 U.S. 45, 54 (1984). The Federal Circuit did not find an abuse of discretion and could not have done so in this case.[3]

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[2] Ralph C. Nash & John Cibinic, *DEFINING "COSTS": Using Smoke And Mirrors*, 17 The Nash & Cibinic Report ¶ 15 (Mar. 2003) critiques the Federal Circuit decision.

[3] Underlying the Federal Circuit decision is the concern that unless the revenue shares are included in the base for allocating indirect costs the overhead allocation base would be unfair and substantially distort the overhead allocation. This unfairness and distortion concern was misplaced and shows the need for expert testimony. CAS 410.50 expressly permits a contractor to use a value added allocation base that excludes all material and subcontract costs from the base. *Ford Aerospace & Communications Corp., Aeronutronic Div.*, ASBCA No. 23833, 1983-2 B.C.A. (CCH) ¶ 16,813, illustrates the complicated accounting question involved in deciding overhead distortion issues.

IV. THE APPLICABLE RULES OF EVIDENCE AND THIS COURT'S DECISIONS MAKE THE TRIER OF THE FACTS THE GATEKEEPER ON THE ADMISSIBILITY OF EXPERT TESTIMONY.

A. The Rules Of Evidence Give The Trier Of The Facts Broad Discretion In Admitting Expert Testimony.

Federal Rule of Evidence ("FRE") 702 provides:

> If . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In explaining the purpose of FRE 702, the Advisory Committee's Notes state:

> The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts.

These Notes further state:

> Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute (internal quotations and citation omitted).

FRE 704 provides:

> [T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

The Advisory Committee's Note on FRE 704 points out that: "the so-called 'ultimate issue' rule is specifically abolished by the instant rule." Accordingly, the threshold issue under FRE 702 and 704 is whether the expert testimony would assist the trial judge in understanding the evidence and deciding the case.

B. This Court's Decisions Make The Trier Of The Facts The Gatekeeper On Expert Testimony.

This Court's decisions in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) and *Kumho Tire Co., v. Carmichael*, 526 U.S. 137, 147, 152 (1999) make it clear that trial judges: (1) are the "gatekeepers" on the admissibility of expert testimony; (2) have the responsibility of ensuring that the expert testimony is relevant and reliable; and (3) have broad latitude in the methodology used to determine reliability and the ultimate conclusion of reliability.

V. THIS COURT'S PRECEDENTS AND THE FEDERAL CIRCUIT'S PRECEDENTS ARE DIRECTLY CONTRARY TO THE EXCLUSION OF EXPERT TESTIMONY IN THIS CASE AND REQUIRE REVERSAL.

The law is well established that specialized terms are like technical terms or terms of art that permit expert testimony to assist the trial judge in understanding the evidence and deciding the case. *See* 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 702.03[1] (2d ed. 2003) (stating that "the courts recognize matters as being so

technical or specialized in nature that expert evidence is required").

In *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974) (involving interpretation of equal pay and discrimination under similar "working conditions"), this Court pointed out that the seemingly transparent statutory language "working conditions" used technical words or words of art. Therefore, "it [is] proper to explain them by reference to the art or science to which they [are] appropriate." *Corning Glass*, 417 U.S. at 201 (citing *Greenleaf v. Goodrich*, 101 U.S. 278, 284 (1880)). Therefore, even though interpreting that statute was obviously a question of law, it was relevant to that interpretive question to hear expert testimony in the appropriate "art or science" on the meaning of the key term "working conditions."

Corning Glass also held this principle is particularly salutary where Congress included words "having a special meaning within the field regulated by the statute." The Court reasoned:

> While a layman might well assume that time of day worked reflects one aspect of a job's 'working conditions,' the term has a different and much more specific meaning in the language of industrial relations. . . . This definition of 'working conditions' is not only manifested in Corning's own job evaluation plans but is also well accepted across a wide range of American industry.

Id. at 202. Similarly, in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 372 (1986) (involving whether depreciation was to be included in the customer charges), this Court, citing *Corning Glass*, held that "technical terms of art should be interpreted by reference to the trade or industry to which they apply."

In the instant case, the Board used expert witness testimony for the precise salutary purpose endorsed by this Court in the *Corning Glass* case -- *i.e.*, to understand the term "cost" as used in specialized cost accounting standards and how that term should be applied under the particular facts of this case. That use of expert witness testimony was plainly appropriate and the Federal Circuit erred in rejecting the testimony as irrelevant and in overturning the Board's proper exercise of its discretion to admit the testimony.

The Federal Circuit's rejection of expert testimony in the instant case is directly contrary to longstanding practice and precedents of that court and boards of contract appeals. Until now, the Federal Circuit's decision in *United States v. Lockheed Corp.*, 817 F.2d 1565, 1572 (Fed. Cir. 1987), was the controlling precedent on any question on the use of expert testimony to define a CAS term.

In *Lockheed,* expert testimony was admitted by the ASBCA and relied upon by the Board and the Court to define "factor" as used in CAS 403. Another precedent is *Boeing Co. v. United States*, 680 F.2d 132, 136 (Ct. Cl. 1982), *cert. denied*, 460 U.S. 1081 (1983), where expert testimony admitted by the Board was recognized as useful in the Court's analysis that the assessment base method directly allocates the tax expense to segments under CAS 403.

The Federal Circuit's decision in the instant case cannot be permitted to stand as precedent controlling admission of expert testimony in resolving government contract and other disputes within that Court's jurisdiction.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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